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No. 02-1315

In The
Supreme Court of the United States

GARY LOCKE, *et al.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, individual rights – including religious liberty, separation of powers, and free enterprise. Landmark was established in 1976 and maintains offices in Kansas City, Missouri and Herndon, Virginia. Since 1994 Landmark has argued in education reform cases, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), that the Free Exercise Clause prohibits discrimination by states in the award of education benefits to students for use in private or public educational institutions.

ARGUMENT

A majority of early Americans were Protestant Christians, and many of the fundamental principles of both the national and state governments were steeped in Protestant theology. With an increasing number of Catholics, Jews and other non-Christian traditions, however, many American cultural conventions were beginning to be called into question following the Civil War. In the public schools, for example, Catholics demanded that their version of the Bible be taught to their children, and many Jews called for the complete removal of religious instruction. In response,

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *Amicus Curiae* and its counsel, made a contribution to the preparation and submission of this brief.

a movement led by Representative James Blaine of Maine developed to protect the status quo in public education.

Driven by his desire to preserve a Protestant national culture, as well as his ambition to be elected president, Blaine in 1875-76 led an effort to amend the U.S. Constitution to apply the First Amendment to the states and prohibit state governments from, *inter alia*, supporting "sectarian", i.e., Catholic, schools with public funds. See Mark E. DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559 (2003). Blaine's proposal was approved by the House of Representatives, but fell short of the required supermajority in the Senate.

The Blaine Amendment's supporters, however, had sufficient congressional strength to attach a provision to the Enabling Act of 1889 requiring certain states, including Washington, to include a Blaine Amendment in their constitutions. The Washington State Constitutional Convention adopted the provision, which in this case is being wrongly relied on by the State as the justification for its refusal to provide Joshua Davey a state-funded scholarship because he has chosen to pursue a degree in theology.

I. THE WASHINGTON STATUTE IMPERMISSIBLY DISCRIMINATES AGAINST RELIGION.

The U.S. Constitution is the supreme law of the land. U.S. Const. Art. VI, Cl. 2. provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and

> the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It is long settled law that a state constitutional provision cannot be used to usurp or displace an individual's federal constitutional rights. See, e.g., *Hunter v. Martin, Devisee of Fairfax*, 14 U.S. 304, 324-25 (1815).

State constitutions can be more protective of individual rights than the federal constitution. See, e.g., *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). However, states cannot abridge rights granted by federal law. *Northwest Central Pipeline v. Kansas Corp. Comm.*, 489 U.S. 493, 509 (1989). An asserted state interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" is nevertheless limited by the Free Exercise Clause. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). In order to pass constitutional muster, a law must be generally applicable and neutral with respect to religion. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). "The minimum requirement of neutrality is that a law not discriminate on its face." *Id.* See *Church on the Rock v. City of Albuquerque*, 84 F. 3d 1273, 1279 (10th Cir. 1996), *cert. denied*, 17 S.Ct. 360 (1996).

Moreover, the protections of the Free Exercise Clause apply when the law at issue discriminates against some or all religious beliefs. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). See also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) where under the Free Exercise Clause, the state may not "impose special disabilities on the basis of religious views or religious status." Where a law denies the benefit to someone on the

basis of his religious exercise, such denial is presumptively unconstitutional. In effect, the denial of the benefit is the equivalent of imposing a fine for engaging in the religious practice. See *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The Washington law at issue here provides a state funded benefit known as a Promise Scholarship to students who qualify by virtue of their high school grades, their family income, and their attendance at any accredited Washington college or university. See *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002). On its face, the Promise Scholarship lacks neutrality regarding religious practice or belief as it specifically prohibits the use of scholarship funds for a theology degree. *Id.* at 753; Wash. Admin. Code § 250-80-020(12). Moreover, as the program is applied by the state, only students majoring in theology taught from a religious perspective are singled out for exclusion from the program. *Davey*, 299 F.3d at 751.

Since the Scholarship Program is not neutral on its face, the Ninth Circuit correctly applied the strict scrutiny analysis to the program. See *id.* The State's defense that the Washington Constitution's Blaine provision required the exclusion of theology majors and therefore constituted a compelling state interest was properly rejected by the Ninth Circuit. *Id.* at 759-60.[2]

[2] Although Petitioners have not asserted the Establishment Clause of the First Amendment to the U.S. Constitution as a defense, a state constitutional provision cannot violate the protection afforded by the federal Free Exercise Clause under the well-settled principles of the Supremacy Clause. U.S. Const. Art. VI.

As a secondary argument, Petitioners argue that the State has no independent obligation to fund Mr. Davey's exercise of a constitutional right. (Petitioner's Brief 22-26.) As the Ninth Circuit correctly noted in rejecting this assertion, however, this Court has held that the government may not deny an individual a benefit because he or she exercises a constitutional right. *Id.* at 755 (citing *Regan v. Taxation Without Representaion*, 461 U.S. 540, 545 (1983). Moreover, as this Court concluded in *Rosenberger v. Rector and Board of Visitors*, 515 U.S. 819 (1995), the government cannot restrict an otherwise generally available benefit on the basis that a qualifying recipient takes his or her religion too seriously.[3]

Finally, Petitioner's assertion that a Promise Scholarship recipient can pursue theological studies by attending two separate institutions or simply by concealing his or her major by delaying a declaration of a major, highlights the failure of the State's defense. Ironically, the Government claims that a student can qualify for a need-based scholarship by incurring greater educational costs. Even more ironic is that the State's argument stands for the proposition that a theology student need only report falsely his or her field of study in order to secure a Promise Scholarship.

[3] Based on the viewpoint discrimination analysis in the *Rosenberger* decision, the Promise Scholarship's singling out of theology majors for disparate treatment is no less constitutionally offensive than a provision specifically prohibiting students from majoring in Women's Studies.

II. *AMICI CURIAE* DISTORT FEDERAL ESTABLISHMENT CLAUSE AND WASHINGTON BLAINE AMENDMENT HISTORY.

While Petitioner does not rely on the Federal Establishment Clause as a defense to its discriminatory Promise Scholarship program, the briefs of *Amici Curiae* National Education Association and American Civil Liberties Union, et al., argue that the federal Establishment Clause provides justification for denying Mr. Davey a Promise Scholarship. In support of their argument, these *Amici* assert wrongly that James Madison's Memorial and Remonstrance Against Religious Assessments embodied Jefferson's "wall" between church and state. Moreover, the ACLU, et al., assert falsely that the Washington State Constitution's religion provisions were an "echo" of the Virginia Act for Establishing Religious Freedom of 1786. (Brief of *Amici Curiae* ACLU, et al., at 15-17.) As set forth below, the historical record demonstrates plainly that both of these assertions are wrong as a matter of historical fact.

In truth, at the time the Virginia Act was adopted, there had been more than a century of commonplace commingling of functions between government at all levels and churches, which continued after the Act's passage. *Amici*'s inference that religion suddenly had been removed from government function is utterly false. The Act simply preserved the status quo without allowing for a general tax designed to support religious institutions. Moreover, when Washington joined the union, religious bigotry against Catholics was so prevalent that the Congress required the adoption of Blaine amendment language as a condition of statehood. See DeForrest, supra, 26 Harv. J.L. & Pub. Pol'y at 574 (2003). The ACLU would have this

Court pretend that Washington State was above such conduct, but the record paints a very different picture.

A. The Founders Never Intended The Establishment Clause To Remove Religion From The Public Square.

Modern day Establishment Clause discussion has been cut off from the Constitution's historical moorings. With the passage of more than 200 years since the Establishment Clause's adoption, it is important to recall the historical context of "establishment" when the Bill of Rights was introduced and Jefferson described the wall of separation between Church and State.

As Chief Justice Rehnquist noted in his dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985), "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with [Thomas] Jefferson's misleading metaphor for nearly 40 years." Of course, Chief Justice Rehnquist is referring to Jefferson's now infamous letter to the Danbury Baptist Association in which he asserted that "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Id.* at 91-92 (quoting 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).) Chief Justice Rehnquist went on to explain that Jefferson's "letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than

ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Id.* at 92. Nonetheless, this Court beginning with *Reynolds v. United States*, 98 U.S. 145 (1879), adopted Jefferson's wall of separation metaphor, and it maintains a presumption of validity in much of current day jurisprudence. *Amici* supporting Petitioner seek to perpetuate this myth at the expense of Mr. Davey's religious freedom. From early colonial days through much of the nation's first century, religion was a fixture in the public square.

Although not every colony began for purely religious purposes, many of the original states had been colonized by religious nonconformists who had suffered in Europe under state churches, such as the Church of England. Yet the practice of establishing churches continued in the new world, so that some of the formerly nonconformist churches, such as the Puritans (later the Congregationalists) in Massachusetts, became some of the established churches in the colonies. See *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 8-10 (1947). Not only did many colonies exact taxes for maintenance of established churches, religious orthodoxy was upheld as well. The punishment and execution of heretics thus continued in Massachusetts, with the expulsion of Roger Williams and Anne Hutchinson in the 1630's and the execution of Mary Dyer and other Quakers in the 1660's. See Edmund S. Morgan, *The Puritan Dilemma: The Story of John Winthrop* 115-33 (1958); Edwin Scott Gaustad, *A Religious History of America* 67-68 (1990); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U.L. Rev. 455, 464 (May 1991). The Quakers found similar treatment at the hands of the Anglicans in Virginia, where a series of anti-Quaker laws passed in the late 1600's criminalized the

refusal of Quakers to baptize their children, prohibited their unlawful assembly, and provided for their execution if they returned after expulsion. Thomas Jefferson, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON (NOTES ON VIRGINIA) 173 (Adrienne Kock & William Peden eds., Modern Library 1993). Jefferson noted that, "If no capital execution took place here, as did in New England, it was not owing to the moderation of the church, or spirit of the legislature, as may be inferred from the law itself; but to historical circumstances which have not been handed down to us."

A hundred years later, the nonconformists continued to suffer under the established churches. In Virginia, non-Anglican preachers were required to obtain a license from the state. Baptists refused as a matter of principle and over 45 Baptist ministers were jailed for this offense in Virginia between 1765 and 1778. Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (2002), at 52. In Connecticut, Congregationalists enjoyed a position of advantage along with the Federalists, so that the union of political and religious interests was known as "the Standing Order." Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (2002), at 32-33.

> Congregationalists enjoyed many privileges, and dissenters suffered many disabilities, both social and legal, under this regime. Most important, all citizens, Congregationalists and dissenters alike, had to pay taxes for the support of the established church. Civil authorities imposed penalties for failure to attend church on Sunday or to observe public fasts and thanksgivings, and positions of influence in public life were reserved for Congregationalists. Dissenters were often denied

> access to meetinghouses, their clergy were not authorized to perform marriages, and dissenting itinerant preachers faced numerous restrictions and harassment by public officials.

Id. Despite the Toleration Act of 1784, which exempted nonconformists from tax, dissenters such as the Baptists chafed under the remnants of the Standing Order. *Id.* at 33.

With this backdrop of nearly 200 years of taxation, forced expulsion, and even execution of nonconformist Christian sects, the Framers of the Constitution and the Bill of Rights took on the issue of religious establishment.

> It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the *national government* all power to act upon the subject. The situation, too, of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment.

Joseph Story, *Commentaries on the Constitution of the United States,* § 1873 (1833) (emphasis added).

Yet Story also noted the widespread belief during consideration of the First Amendment that Christianity should not be held with indifference by the state, let alone outright antipathy.

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Id. § 1868.

Furthermore, according to Story:

> Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. § 1873.

The Establishment Clause, therefore, can best be understood as an agreement among the states that no single church should receive national sponsorship. According to the "sense of justice" of many states, a *state* establishment was beneficent. See Mass. Const. of 1780, Part 1, Art. III; N. H. Const. of 1784, Art. VI; Md. Declaration of

Rights of 1776, Art. XXXIII; R. I. Charter of 1633 (superseded 1842). The purpose behind the Establishment Clause thus was not to stamp out all traces of religion in public life. It defies logic to suggest that after decades of religion so deeply entwined with the states that on one day the Framers decided to stamp out all traces of religion in public life. This misperception, unfortunately, has taken hold among many of America's jurists and historians. And it is this misperception that the NEA and ACLU, et al. want to perpetuate.

James Madison, who was a leader in the House during the debates on the issue, cannot be used as a stand-in for Jefferson's later position. As the Chief Justice noted, "it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution." *Id.* at 97-98. He initially did not even believe that the Bill of Rights were necessary and the language he originally proposed for the Establishment Clause, "nor shall any national religion be established," as the Chief Justice has observed, "obviously does not conform to the 'wall of separation' between church and State idea which latter-day commentators have ascribed to him." *Id.* at 98. It is more likely that Madison "saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion." *Id.*

The actions of the First Congress, contemporaneous with the Bill of Rights, confirm this interpretation of the Establishment Clause. On the same day the House voted on the First Amendment, the House passed the Northwest

Ordinance, 1 Stat. 50, which reenacted the Northwest Ordinance of 1787, and provided that "[religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at 52, n. (a).

In addition to their reliance on a selective reading of Madison's Memorial and Remonstrance, the ACLU, et al., and NEA argue that the Founders intended to prohibit the use of governmental tax power to support religious instruction. ACLU Brief, p. 16 (citing Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L.Rev. 875, 869-99. (1986).) NEA Brief, pp. 18-19 (also citing Laycock, supra.) Each *Amici* takes both Madison and Laycock out of their proper contexts.

As Professor Laycock has argued to this Court previously on the issue of government support of religion:

> If history settles anything in this area, it is that a general assessment would be unconstitutional.
>
> But this case is not about a general assessment; indeed, nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833. In the typical modern dispute about funding religious organizations, the state claims that it is funding some secular function performed by the church; those who object to funding claim that the function is really religious or that the secular function is insufficiently insulated from religious functions. And whether the function to be funded is religious or secular, modern funding programs always include both secular and religious organizations.

Brief of *Amicus Curiae* of Christian Legal Society, 1994 Briefs 329.

The *Amici*'s reliance on Professor Laycock to support the proposition that the founders never intended for government money to go toward the training of ministers misrepresents grossly the professor's argument. Indeed, Professor Laycock later cautioned this Court when considering *Zelman v. Simmons-Harris* that a strict "no funding" rule such as that promoted in this case by *Amici*, "must be narrowly construed to reach only those programs, like the Virginia general assessment, that fund exclusively religious activities because of their religious quality for the purpose of facilitating religious indoctrination." Brief of *Amicus Curiae* of Christian Legal Society, 2000 U.S. Briefs 1751.

B. Washington's Blaine Amendment Was Intended To Preserve The Protestant Status Quo In Public Schools.

More troubling is *Amici* ACLU, et al.'s assertion that the Washington State Constitution's religion provisions prohibiting the use of public funds for sectarian schools is an "echo" of the Virginia Act is utterly false. In truth, the Washington State constitutional convention was "squarely within the common school movement, which maintained that public schools should present wholesome nonsectarian[4] religious influence by teaching about general religious principles." Robert F. Utter & Edward J. Larsen, *Church*

[4] I.e., non-Catholic – see *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

and State on the Frontier: The History of Establishment Clauses in the Washington State Constitution, 15 Hastings Const. L.Q. 451, 462 (1988). See DeForrest, supra, 26 Harv. J.L. & Pub. Pol'y at 576. Indeed, as Professor DeForrest has reported:

> Despite their ardent desire to preserve public education from the scourge of sectarianism, the Washington State framers did not want to prejudice generic religion in the new state constitution. Like Blaine and those who supported the Blaine Amendment, they believed in robust religious presence in the public square, so long as that religious presence was compatible with broad Protestant devotional sentiment.

Id. at 575. Washington's framers, who were dominated by delegates who supported Blaine for president in 1876, 1880, 1884 and in 1892, were happy to comply with the federal Enabling Act, which conditioned Washington's statehood on the condition that it adopt in its state constitution Blaine's language. *Id.* The result in Washington was "to follow precisely the purpose and intent of the national Blaine Amendment." *Id.* at 576. Upon such an illegitimate legal basis this Court should not overturn the Ninth Circuit's decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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